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No. 84-363

In the Supreme Court of the United States

OCTOBER TERM, 1984

NORTHEAST BANCORP, INC., ET AL., PETITIONERS

v.

BOARD OF GOVERNORS OF THE
FEDERAL RESERVE SYSTEM, ET AL.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT

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QUESTIONS PRESENTED

1. Whether Section 3(d) of the Bank Holding Company Act of 1956 (12 U.S.C. 1842(d)) authorizes a state to permit the acquisition of banks within its borders only by bank holding companies located in certain regions in the United States.

2. Whether such geographically restrictive state banking statutes, enacted under the authority of Section 3(d) of the Bank Holding Company Act of 1956, violate the Commerce Clause or Compact Clause of the Constitution.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A21-A33) is reported at 740 F.2d 203. The three orders of the Federal Reserve Board at issue in this case (Pet. App. A34-A71, A72-A78 and A79-A87), which set forth its position, are reported at 70 Fed. Res. Bull. 374, 353 and 524.

JURISDICTION

The judgment of the court of appeals was entered on August 1, 1984. The petition for a writ of certiorari was filed on September 6, 1984, and was

granted on January 7, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant constitutional and statutory provisions are reproduced at Pet. App. A95-A102.

STATEMENT

1. Under the Bank Holding Company Act of 1956 (BHCA or Act) (12 U.S.C. 1841 *et seq.*), a bank holding company may not acquire a bank unless the transaction is approved by the Federal Reserve Board (Board). 12 U.S.C. 1842(a). Section 3(d) of the Act (12 U.S.C. 1842(d)) (the Douglas Amendment) generally bars the Board from approving the acquisition of a bank located in one state by a bank holding company that has its principal place of business in another state. But the Douglas Amendment empowers the Board to approve such interstate transactions in one circumstance: when "the acquisition of * * * a State bank by an out-of-State bank holding company is specifically authorized by the statute laws of the State in which such bank is located, by language to that effect and not merely by implication." The Douglas Amendment therefore has the effect of permitting only those interstate banking acquisitions that are expressly authorized by the law of the state in which the target bank is located. See generally *Lewis* v. *BT Investment Managers, Inc.*, 447 U.S. 27, 46-47 (1980).

In late 1982, the Massachusetts legislature enacted a statute (Mass. Ann. Laws ch. 167A, § 2 (West 1971 & Supp. 1984), *reprinted* at Pet. App. A101-A102) (the Massachusetts Act) that permits the

acquisition of Massachusetts banks by out-of-state bank holding companies. The statute contains a significant limitation, however; it authorizes interstate acquisitions only if the acquiring bank holding company has its principal place of business in another New England state (that is, in Connecticut, Maine, New Hampshire, Rhode Island or Vermont).[1] On June 8, 1983, Connecticut enacted a similar statute (1983 Conn. Acts 83-411 (Reg. Sess.), *reprinted* at Pet. App. A97-A100) (the Connecticut Act), which authorizes the acquisition of Connecticut banks by holding companies based in the other five New England states.[2] The remaining New England states have taken a variety of approaches to interstate banking.[3]

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[1] The statute also contains a reciprocity provision, which permits the acquisition of Massachusetts banks by out-of-state holding companies only when the home state of the acquiring company grants reciprocal acquisition rights to Massachusetts bank holding companies.

[2] The Connecticut Act contains a reciprocity provision similar to the one found in the Massachusetts Act. It also provides that a New England bank holding company must divest itself of its Connecticut banks if the company acquires a bank, or is itself acquired by a bank holding company, that has its principal place of business in a state outside of New England.

[3] Rhode Island has enacted a statute that, like the Massachusetts Act, contains both regional restrictions and a reciprocity provision (1983 R.I. Pub. Laws S.0661, *reprinted at* Pet. App. A103-A106) : the Rhode Island regional restrictions, however, will expire on July 1, 1986. A Maine statute permits virtually unrestricted acquisitions of in-state banks by out-of-state holding companies. Me. Rev. Stat. Ann. tit. 9B, § 1013 (Supp. 1984). New Hampshire and Vermont have not lifted the Douglas Amendment's prohibition on interstate bank acquisitions.

2. Following the enactment of the Massachusetts and Connecticut Acts, three sets of Massachusetts and Connecticut bank holding companies agreed to merge.[4] These companies then applied to the Board for approval of the transactions. The applications were opposed by the petitioners in this case (see 12 U.S.C. 1850 and Pet. App. A38 n.6), New York and Connecticut bank holding companies and a Connecticut bank, which argued that the Massachusetts and Connecticut Acts authorizing the acquisitions violate the Commerce (Art. I, § 8, Cl. 3) and Compact (Art. I, § 10, Cl. 3) Clauses of the Constitution.[5]

Despite these objections, the Board approved the applications (Pet. App. A34-A71, A72-A78, A79-A86). Turning first to the statutory language, the Board found that, while the Douglas Amendment does not on its face refer to state authorization of interstate acquisitions by region (Pet. App. A65), the Massachusetts and Connecticut Acts nevertheless fall within the Amendment's literal terms by "meet-[ing] the requirement of express authorization for

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[4] Respondent Bank of New England Corporation, a Massachusetts bank holding company, agreed to merge with respondent CBT Corporation, a Connecticut bank holding company; respondent Hartford National Corporation, another Connecticut bank holding company, agreed to acquire Arltru Bancorporation, Inc., a Massachusetts bank holding company; and respondent Bank of Boston Corporation, a Massachusetts bank holding company, agreed to acquire Colonial Bancorp, Inc., a Connecticut bank holding company (Pet. App. 22).

[5] Separate applications were presented to the Board concerning each of the proposed transactions. Petitioner Citicorp challenged all three of the applications; the other petitioners challenged only the Bank of New England-CBT application. On appeal, the Second Circuit consolidated the three challenges (Pet. App. A26-A27).

interstate bank acquisitions imposed by section 3(d) of the Bank Holding Company Act" (Pet. App. A37). The Board then concluded that "there is no clear and unequivocal basis for a determination" that the Acts are inconsistent with the Commerce Clause (Pet. App. A37, A74-A75, A83),[6] and rejected petitioners' Compact Clause claim on the ground that "the Douglas Amendment should be read as a renunciation of federal interest in regulating the interstate acquisition of banks by bank holding companies" (Pet. App. A52).[7]

The court of appeals upheld the Board's orders. The court reasoned that the Massachusetts and Connecticut Acts "specifically authorize acquisitions" of in-state banks by out-of-state holding companies and therefore are supported by the Douglas Amendment (Pet. App. A29). This conclusion disposed of petitioners' Commerce Clause argument, the court continued, because "Congress may authorize the states to enact statutes which may interfere with interstate commerce" (Pet. App. A30), and "by enacting the Douglas Amendment, Congress authorized Massachusetts and Connecticut to enact the statutes challenged here" (Pet. App. A31). The court found the state Acts consistent with the Compact Clause because the

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[6] The Board explained that it would not declare a state law inconsistent with the Constitution absent " 'clear and unequivocal evidence of the inconsistency.' " Pet. App. A40, quoting *NCNB Corp.*, 68 Fed. Res. Bull. 54, 56 (1982). See Pet. App. A74, A83.

[7] The Board also found that the acquisitions met the traditional competitive, financial and managerial standards set out in Section 3(c) of the BHCA (12 U.S.C. 1842(c)). See Pet. App. A41-A48, A75-A78, A80-A86. These determinations are not challenged here.

New England banking arrangement does not "encroach upon or interfere with the just supremacy of the United States" (Pet. App. A32).[8]

SUMMARY OF ARGUMENT

A. While state enactments affecting interstate banking must conform to the Commerce Clause, it is well-established that " 'Congress may confe[r] upon the States an ability to restrict the flow of commerce that they would not otherwise enjoy.' " *Western & Southern Life Ins. Co.* v. *Board of Equalization*, 451 U.S. 648, 652-653 (1981), quoting *Lewis* v. *BT Investment Managers, Inc.*, 447 U.S. 27, 44 (1980). The Douglas Amendment confers just such an ability upon the states, and therefore renders the state Acts at issue here "invulnerable to Commerce Clause challenge." *Western & Southern*, 451 U.S. at 653.

The Massachusetts and Connecticut Acts plainly are "statute laws" that "specifically authoriz[e]" the acquisition of "a State bank by an out-of-State bank holding company," and therefore are precisely the type of state enactment that is described—and constitutionally validated—by the Douglas Amendment. Because the Amendment affirmatively invites the states to involve themselves in the regulation of interstate commerce, it is not appropriate to search for exceptions to the delegated regulatory authority that do not appear in the language or legislative history of the Amendment. *Western & Southern*, 451 U.S. at 653.

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[8] The court of appeals also rejected a challenge to the Massachusetts and Connecticut Acts based on the Equal Protection Clause (Pet. App. A32-A33). That challenge is not repeated here.

Indeed, the Amendment's extraordinary structure, which "requires discrimination in interstate commerce, and then leaves it to the several states to correct it" (102 Cong. Rec. 6860 (1956) (remarks of Sen. Bennett)), demonstrates in an unusually clear and profound manner Congress's intention to "redefine the distribution of power over interstate commerce." *Southern Pacific Co.* v. *Arizona ex rel. Sullivan*, 325 U.S. 761, 769 (1945). In light of this statutory structure, petitioners' contention that the Douglas Amendment authorizes enactment only of state laws that otherwise would be valid under the Commerce Clause is insupportable: in the absence of the Amendment, there would not be—and could not be—any valid state law purporting to control the authorization of, or otherwise regulating, interstate bank acquisitions.

B. The legislative history of the Amendment supports the view that the breadth of the statutory language should be taken at face value. Congressional discussion of the BHCA was replete with references to the importance of the banking industry to states and localities. The Amendment itself expressly was structured to leave room for the exercise of "state policy" in "the expansion of bank holding companies across state lines" (*Iowa Independent Bankers* v. *Board of Governors*, 511 F.2d 1288, 1297 (D.C. Cir.), cert. denied, 423 U.S. 875 (1975)), while the comments of congressional proponents and opponents alike evinced a recognition that the Amendment would "alter the limits of state power otherwise imposed by the Commerce Clause." *United States* v. *Public Utilities Comm'n*, 345 U.S. 295, 304 (1953). Indeed, the state Acts at issue in the present case were in large part designed to further the very pur-

poses that inspired the enactment of the Amendment: both Acts were intended to increase competition in the banking industry, while ensuring that the owners of local financial institutions remained sensitive to "[t]he particular financial needs and problems of the community." 102 Cong. Rec. 6862 (1956) (statement of Sen. Payne).

C. That the Douglas Amendment authorizes enactments such as the state Acts at issue here is confirmed by the reading given the Amendment by the Board, the agency charged by Congress with "primary responsibility for administering the BHC[A]." *Securities Industry Ass'n* v. *Board of Governors*, No. 83-614 (June 28, 1984), slip op. 8. The Board held in this case, as it repeatedly has held in the past, that state statutes providing for only limited interstate banking suffice to provide the requisite state authorization under the Douglas Amendment—although virtually all of the statutes that were addressed in these decisions would run afoul of the Commerce Clause in the absence of congressional authorization. The Board has thus consistently rejected the contention, essentially repeated by petitioners here, that "Congress did not intend to allow state legislatures to choose selectively which out-of-state bank holding company could enter the state." *Northwest Bancorporation*, 38 Fed. Reg. 21530, 51531-21532 (1973). Accepting petitioners' contention that only state statutes that otherwise are valid under the Commerce Clause may be given force under the Douglas Amendment therefore would require rejection both of the Board's long-settled view and of a wide range of state statutes providing for interstate bank acquisitions.

D. The state Acts—even if we assume that they are "compacts"—do not fall within the meaning of

the Compact Clause because they neither "enhance[] state power *quoad* the National Government" nor disturb the "federal structure." *United States Steel Corp.* v. *Multistate Tax Comm'n*, 434 U.S. 452, 473, 478 (1978). The Massachusetts and Connecticut Acts can hardly encroach on specific federal banking concerns; Congress itself struck the balance between federal and state authority in the area of interstate bank acquisitions when it enacted the Douglas Amendment. And nothing in either Act works more broadly "to the detriment of federal supremacy" (*id.* at 460), creates any multistate governmental entity, or confers new or expanded political powers upon one or more states. Conversely, the state Acts do not bear at all upon the political "authority and power" of states outside of New England (*id.* at 494 (White, J., dissenting)).

ARGUMENT

THE MASSACHUSETTS AND CONNECTICUT ACTS ARE CONSISTENT WITH THE COMMERCE AND COMPACT CLAUSES OF THE CONSTITUTION

A. The Douglas Amendment Authorizes State Enactments Relating To Interstate Bank Acquisitions That Otherwise Would Be Inconsistent With The Commerce Clause

The constitutional principles that control the analysis of the Commerce Clause challenge in this case are well-established. In the absence of congressional authorization, there is little doubt that state enactments burdening interstate banking would run afoul of the Commerce Clause. See, *e.g.*, *Lewis*, 447 U.S. at 36; *City of Philadelphia* v. *New Jersey*, 437 U.S. 617, 624 (1978); *Great Atlantic & Pacific Tea Co.* v. *Cottrell*, 424 U.S. 366, 370-371 (1976). It is equally plain, however, that "Congress may 'confe[r] upon

the States an ability to restrict the flow of interstate commerce that they would not otherwise enjoy.'" *Western & Southern Life Ins. Co.* v. *State Board*, 451 U.S. 648, 652-653 (1981), quoting *Lewis*, 447 U.S. at 44. See *White* v. *Massachusetts Council of Construction Workers*, 460 U.S. 204, 213 (1983); *Prudential Ins. Co.* v. *Benjamin*, 328 U.S. 408, 427-432 (1946).[9] The Douglas Amendment confers just such an ability upon the states, and therefore renders the Massachusetts and Connecticut Acts "invulnerable to Commerce Clause challenge." *Western & Southern*, 451 U.S. at 653.

1. a. The Douglas Amendment directs the Board to enforce—and therefore constitutionally validates—state laws that "specifically authoriz[e]" the acquisition of in-state banks by out-of-state bank holding companies. The state Acts at issue here are precisely the type of enactment that is described by the Amendment. Both plainly are "statute laws" that "specifically authoriz[e]" the acquisition of "a State bank by any out-of-State bank holding company" (12 U.S.C. 1842(d)), and both undoubtedly were intended to authorize the transactions challenged in this case. The Board and the court of appeals accordingly recognized that the Massachusetts and Connecticut Acts fall within the literal terms of the Douglas Amendment; the only other court that has addressed the language of the Amendment similarly found it "obvious" (*Iowa*

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[9] Two amici curiae hint that even Congress lacks the constitutional authority to approve regional banking arrangements. Amicus Curiae Chase Manhattan Corp. Br. 7-8 n.12; Amicus Curiae Bank of New York Co., Inc. Br. 18 & n.13. This point is not pressed by petitioners, however. In any event, the Court has explained that "[t]he only limitation [the Commerce Clause] places upon Congress' power is in respect to what constitutes commerce." *Benjamin*, 328 U.S. at 423.

Independent Bankers v. *Board of Governors*, 511 F.2d 1288, 1297 (D.C. Cir.), cert. denied, 423 U.S. 875 (1975)) that "the Douglas Amendment empower[s] states to discriminate among out-of-state bank holding companies when deciding which [can] enter" (*Conference of State Bank Supervisors* v. *Conover*, 715 F.2d 604, 613 (D.C. Cir. 1983), cert. denied, No. 83-954 (Apr. 2, 1984)).

Petitioners respond to the statutory language by suggesting that, while the Douglas Amendment undoubtedly permits the states to enact statutes "specifically authorizing" given types of interstate banking, the Massachusetts and Connecticut Acts nevertheless are invalid because the Amendment fails to declare with sufficient specificity that "such state laws [are] immune from the Commerce Clause" (Citicorp Br. 21).[10] Petitioners' underlying legal proposition undoubtedly is sound: it is of course true that "a state regulation [may] be removed from the reach of the dormant Commerce Clause" only when "congressional intent [is] unmistakably clear." *South-Central Timber Dev., Inc.* v. *Wunnicke*, No. 82-1608 (May 22, 1984), slip op. 9. But the cases in which the Court has invalidated state enactments for want of the requisite congressional authorization have little bearing

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[10] In petitioners' view, the only state "statute laws" that may be promulgated pursuant to the Douglas Amendment are those that would be valid in the absence of authorizing federal legislation (see Citicorp Br. 21; Northeast Bancorp Br. 22). Given the virtually insurmountable burden borne by those who would defend protectionist economic legislation that overtly discriminates between in-state and out-of-state businesses (see, *e.g.*, *Lewis*, 447 U.S. at 36), however, in practice petitioners' position would leave states with essentially two choices: permitting full interstate banking, or permitting none at all.

here. Those cases involved state attempts to find federal authorization for restrictive conduct by looking to federal policy in analogous areas (*e.g.*, *South-Central Timber*, slip op. 6-10)[11] or by pointing to "standard 'non-pre-emption' clause[s]" in federal enactments (*e.g.*, *New England Power Co.* v. *New Hampshire*, 455 U.S. 331, 343 (1982); *Sporhase* v. *Nebraska ex rel. Douglas*, 458 U.S. 941, 959-960 (1982)). See *Lewis*, 447 U.S. at 49. In such cases the Court has declined to "rewrite [congressional] legislation based on mere speculation as to what Congress 'probably had in mind.'" *New England Power*, 455 U.S. at 343 (citation omitted).

The Douglas Amendment, in contrast, expressly invites the states to involve themselves in the regulation of interstate commerce by giving them an affirmative right to enact statutes authorizing specific interstate banking transactions. The literal text of the Amendment therefore empowers the states to adopt legislation authorizing transactions of the type described, such as the Acts at issue here, that might otherwise be open to Commerce Clause attack. When regulatory authority is conferred upon the states in such terms, it is inappropriate to search for exceptions that do not appear in "the language or history" of the statute

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[11] In *South-Central Timber*, Alaska tried to justify restrictions on the sale of timber from state lands by pointing to similar restrictions on the sale of timber from federal lands in the state. The Court concluded that "[t]he fact that state policy * * * appears to be consistent with federal policy—or even that state policy furthers the goals we might believe that Congress had in mind—is an insufficient indicium of congressional intent. Congress acted only with respect to federal lands; we cannot infer from that fact that it intended to authorize a similar policy with respect to state lands." Slip op. 10.

(*Western & Southern*, 451 U.S. at 653); "a court cannot, in the manner of Sherlock Holmes, pursue the theory of the dog that did not bark." *Harrison* v. *PPG Industries, Inc.*, 446 U.S. 578, 592 (1980).

b. Moreover, petitioners' discussion of the Douglas Amendment's language wholly disregards the import of the extraordinary statutory structure. As Congress plainly recognized, it is the Douglas Amendment itself that "Balkanized" (102 Cong. Rec. 6861 (1956) (remarks of Sen. Bricker)) the nation's banking system by, in the first instance, prohibiting *all* interstate bank acquisitions. It is thus congressional rather than state action that actually works the restriction on commerce complained of by petitioners; even in the absence of the state Acts, out-of-state bank holding companies would be unable to consummate mergers or acquisitions in the New England market. And in sharp contrast to the type of state regulation usually challenged under the Commerce Clause, the state Acts at issue here actually "*permit* expansion of banking across state lines where it otherwise would be federally prohibited." *Lewis*, 447 U.S. at 47 (emphasis in original).[12]

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[12] Petitioners assuredly are incorrect in asserting that *Lewis* "establishes that the Douglas Amendment does not authorize discriminatory state legislation" (Citicorp. Br. 21; see Northeast Bancorp Br. 22-23) relating to in-state bank acquisitions by out-of-state holding companies. In *Lewis*, the Court rejected a claim that the Amendment validated state restrictions on the in-state nonbanking activities of out-of-state bank holding companies. The Court explained that the Amendment grants the states authority "to *permit* expansion of banking across state lines" (447 U.S. at 47 (emphasis in original)), but apparently does not authorize state restrictions "on bank holding company *activities*" (*ibid.*) (emphasis added). The Court added that, whatever the power of the states to regulate

By enacting the Douglas Amendment, Congress therefore exercised its "undoubted power to redefine the distribution of power over interstate commerce" (*Southern Pacific Co.* v. *Arizona ex rel. Sullivan*, 325 U.S. 761, 769 (1945)) in an unusually clear and profound manner. In these circumstances, it is particularly unpersuasive to suggest that Congress was obligated to detail the specific types of state enactments that the Amendment was intended to validate.[13]

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banking matters, the Douglas Amendment cannot be read to authorize state discrimination in the regulation of an out-of-state holding company's *nonbanking* activities. *Ibid.* Because the state Acts in the present case involve the regulation of bank acquisitions, rather than nonbanking activities, *Lewis* is not at all on point. Petitioners' attempt to find Section 7 of the BHCA (12 U.S.C. 1846) dispositive here is similarly flawed (Citicorp Br. 22; Northeast Bancorp Br. 22-23). As *Lewis* explained, that provision was designed simply "to define the extent of the federal legislation's pre-emptive effect on state law" (447 U.S. at 49) as it related to the in-state regulation of bank holding companies. Neither that provision, nor *Lewis*'s discussion of it, has any bearing on the authority of the states to provide for the entry of out-of-state bank holding companies pursuant to the Douglas Amendment.

[13] Indeed, the structure of the statute significantly reduces the force of the Commerce Clause policies relied upon by petitioners (see, *e.g.*, Citicorp Br. 16-17). The requirement that burdens on commerce clearly be authorized by Congress "ensures that there is * * * a collective decision and reduces significantly the risk that unrepresented interests will be adversely affected by restraints on commerce." *South-Central Timber*, slip op. 9-10. Here, the actual burden on commerce—the restriction on interstate acquisitions—was unambiguously imposed by Congress itself. And there surely is less reason to insist upon explicit congressional discussion of the nature of the authorized state enactments when those enactments are *displacing* federally-imposed barriers to commerce.

The statutory structure also suggests in a more pointed way the fundamental distinction between the Douglas Amendment and federal legislation of the sort at issue in cases such as *Sporhase*. Federal nonpreemption clauses, like provisions providing that disputes involving federal projects are to be resolved by reference to state law (see, *e.g.*, *Sporhase*, 458 U.S. at 959-960), preserve or refer to existing state authority, and therefore necessarily "appl[y] only to state legislation that operates within the boundaries marked by the Commerce Clause." *Lewis*, 447 U.S. at 49. This is so, of course, because such federal legislation simply defers to otherwise "*valid* state law," in which "[t]he negative implications of the Commerce Clause * * * are ingredients." *Sporhase*, 458 U.S. at 960 (emphasis in original). Nothing in federal statutes of that sort involves the states as independent actors in a congressionally-adopted scheme for the regulation of interstate commerce. See *ibid.* Here, in contrast, the Douglas Amendment affirmatively grants the states the ability to authorize certain interstate transactions. Indeed, the concept of otherwise "valid state law" simply has no application in this case: in the absence of the Douglas Amendment, there would not be—and could not be—any valid state law purporting to control the authorization of, or otherwise regulating, interstate bank acquisitions.[14]

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[14] Given these clear indications that "Congress affirmatively contemplat[ed] otherwise invalid state legislation" (*South-Central Timber*, slip op. 9), the omission of the term "interstate commerce" from the Douglas Amendment is not significant. There is no "talismanic significance" to any particular statutory formula in this area, so long as the congressional intent is "unmistakably clear" (*ibid.*).

2. a. While the legislative history of the Douglas Amendment is not extensive [15] and does not address in detail the nature of the state enactments authorized, the statutory background supports the view that the breadth of the Amendment's language should be taken at face value. As an historical matter, "banking and related financial activities [have been] of profound local concern" (*Lewis*, 447 U.S. at 38). It is therefore not surprising that the legislative history of the BHCA is replete with references to the importance of the banking industry to states and localities. See, *e.g.*, H.R. Rep. 609, 84th Cong., 1st Sess. 2 (1955); 101 Cong. Rec. 8028 (1955) (remarks of Rep. Patman); *id.* at 8030-8031 (remarks of Rep. Rains); *id.* at 8033 (remarks of Rep. O'Hara); *id.* at 8034 (remarks of Rep. Marshall); 102 Cong. Rec. 6752, 6755 (1956) (remarks of Sen. Robertson); *id.* at 6757-6758 (remarks of Sen. Douglas); *id.* at 6862 (remarks of Sen. Payne); *ibid.* (remarks of Sen. Morse).

Congressional discussion of the Douglas Amendment reflected this respect for "state policy" in the Amendment's particular focus on "the expansion of bank holding companies across state lines." *Iowa Independent Bankers*, 511 F.2d at 1297. The Amendment itself strikes a middle ground between the provision proposed by the House (H.R. 6227, 84th Cong., 1st Sess. § 5(c) (1955)), which would have barred all interstate bank acquisitions without exception, and the initial Senate bill, which would have left it to the Board to approve or disapprove specific interstate transactions (see 102 Cong. Rec. 6752 (1956) (re-

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[15] Because the Amendment was adopted on the Senate floor (see 102 Cong. Rec. 6856-6863 (1956)) its meaning is not addressed in a committee report.

marks of Sen. Robertson)). In its present form, the Amendment therefore is structured to give the greatest deference to state "discretion" (*id.* at 6862 (remarks of Sen. Payne)). The Amendment draws its language—as well as its guiding principle—from the McFadden Act (12 U.S.C. 36(c)), which bars national banks from branching across state lines and permits such banks to branch *within* a state only to the degree permitted state banks by the "statute laws of the State in question." See generally 102 Cong. Rec. 6858, 6860 (1956) (remarks of Sen. Douglas). When the Douglas Amendment was debated, the McFadden Act was perceived as preventing national banks from "expand[ing] across state lines in a way contrary to State policy and * * * even to expand within a State [in such a way]." *Id.* at 6860 (remarks of Sen. Douglas). See generally *First Union Bank & Trust Co.* v. *Heimann*, 600 F.2d 91, 99 (7th Cir. 1979).

The statements by the Douglas Amendment's sponsors consistently hewed to this deferential approach. Senator Douglas explained that his Amendment "permit[s] out-of-State holding companies to acquire banks in other States only to the degree that State laws expressly permit them" (102 Cong. Rec. 6858 (1956)), thus preventing "expan[sion] of bank holding companies] across state lines in a way contrary to State policy" (*id.* at 6860). Other sponsors noted that the Amendment furthered "States [*sic*] rights" (*id.* at 6862 (remarks of Sen. Morse; see also *id.* at 6860 (remarks of Sen. Douglas)), or supported the provision because they believed that the interstate expansion of bank holding companies "is an area best left to [the states'] discretion" (*id.* at 6862 (remarks of Sen. Payne)). Conversely, detractors of the

Amendment properly noted that the provision's "strange approach" turned on its head the usual state of affairs in the regulation of interstate commerce, by "requir[ing] discrimination in interstate commerce, and then leav[ing] it to the several States to correct it" (*id.* at 6860 (remarks of Sen. Bennett)). See *id.* at 6861 (remarks of Sen. Bricker) (Douglas Amendment "forces States to take legislative action to protect themselves").

This background certainly reveals a realization on Congress's part that the Douglas Amendment allows the states to involve themselves in the regulation of interstate commerce in a very unusual way, in terms that do not restrict the nature of the permitted regulation.[16] It necessarily follows that Congress " 'evinc[ed] a[n] * * * intent "to alter the limits of state power otherwise imposed by the Commerce Clause." ' " *South-Central Timber*, slip op. 8, quoting *New England Power*, 455 U.S. at 341, in turn quoting *United States* v. *Public Utilities Comm'n*, 345 U.S. at 304.

b. Moreover, the particular state Acts at issue in the present case were in large part designed to further the very purposes recognized as legitimate by—and that in fact inspired the enactment of—the

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[16] Petitioner Citicorp reads the legislative history to stand for the proposition that Congress wished "to avoid regional discrimination" (Citicorp Br. 25). In support of this assertion, however, petitioner cites legislative comments directed not at the Douglas Amendment, but at unrelated regulatory aspects of the BHCA (see Citicorp Br. 25 n.18, citing 101 Cong. Rec. 8180-8181, 8184 (1955)). Petitioner also cites statements made in debate on the Amendment by Senator Bricker—but he urged rejection of the proposal because the federal restrictions *themselves* balkanized the banking industry. See 102 Cong. Rec. 6861 (1956).

Douglas Amendment. The legislative commission that recommended adoption of the Connecticut Act, for example, acknowledged that interstate banking would have the beneficial effect of "increasing the number of competitors and the vigor of banking competition in the state." Connecticut Br. in Opp. App. 4a. At the same time, however, the commission cautioned that "[t]he promotion of local ownership and control of banks has as one of its objectives the preservation of a close relationship between those in our communities who need credit and those who provide credit," so that "allow[ing] the control of credit that is essential to the health of our state economy to pass to hands that are not immediately responsive to the interests of Connecticut citizens and businesses would not * * * serve [the] state well." *Id.* at 5a. Similarly, the Commission warned against exposing smaller banks to "the rigors of unlimited competition." *Ibid.* Allowing interstate banking on a regional basis, the commission concluded, would serve to increase competition and strengthen local financial institutions; it also would ensure that banks in Connecticut remained sensitive to local concerns, because "there is a community of interest among the New England states." *Id.* at 6a.

It appears that the regional restrictions in the Massachusetts Act were prompted by similar considerations—in particular, by a belief that Massachusetts might best achieve both increased banking competition and continued close ties between the banking industry and the community by allowing expansion on the part of "banking institutions within this region [that] had a tradition and a concern for the stability and the vitality and the economic health of this region." Pet. App. A155 (statement of Mass. State Sen. Brennan). The New England restriction was

a sensible one, the sponsor of the Massachusetts Act added, because "history shows [that in New England] there are six states only by accident and there really should have been one big state." *Id.* at A188. By contrast, the acquisition of New England banks by holding companies headquartered outside of the region, which inevitably would follow from an immediate, blanket lifting of the Douglas Amendment's restrictions (see, *e.g.*, Pet. App. A160, A189), was seen as a threat to the independence of local banking institutions.

Plainly, the state Acts at issue here were designed to provide consumers of banking services with the benefits of increased competition, while at the same time strengthening and preserving local financial institutions. But it is equally plain that legislation motivated by such considerations fully accords with the congressional desire to preserve a banking system in which banks are "owned and managed by citizens of the community in which [they] operat[e]" and therefore are familiar with and sensitive to "[t]he particular financial needs and problems of the community." 102 Cong. Rec. 6862 (1956) (statement of Sen. Payne). Cf. *United States* v. *Phillipsburg National Bank*, 399 U.S. 350, 363-364 (1970) (local bank had extended to small borrowers in the community numerous "unsecured loans on the basis of character").

3. That the Douglas Amendment authorizes enactments such as the state Acts at issue here is confirmed by the reading given the Amendment by the Board, the agency charged by Congress with "primary responsibility for administering the BHC[A]." *Securities Industry Ass'n* v. *Board of Governors*, No. 83-614 (June 28, 1984), slip op. 8. Here, of course,

the Board concluded as a statutory matter that the Massachusetts and Connecticut Acts are the type of state legislation that the Douglas Amendment empowers it to enforce, because those Acts are "statute laws" of the sort expressly described in the Amendment. See Pet. App. A37.

The conclusion that the Douglas Amendment was intended to validate transactions consummated under the authority of restrictive state statutes is consistent with the Board's longstanding approach. Since 1972, at least 14 states (in addition to the states that have acted to permit regional bank acquisitions [17]) have enacted statutes that permit interstate banking on a limited basis. See nn. 18-21, *infra*.[18] Among other things, these statutes allow interstate acquisitions only by companies based in states that have enacted reciprocity provisions,[19] impose conditions expressly designed to limit severely the ability of authorized out-of-state institutions to compete with domestic banks,[20] and otherwise lift the Douglas Amendment's

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[17] It appears that six states in addition to Massachusetts, Connecticut and Rhode Island have enacted statutes permitting interstate bank acquisitions on a regional basis. See Fla. Stat. Ann. § 658.295 (West 1984); Ga. Code § 7-1-621; Ky. Rev. Stat. Ann. § 287.900 (Bobbs-Merrill Supp. 1984); N.C. Gen. Stat. § 53-209 *et seq.* (Supp. 1984); S.C. Code Ann. (to be codified at) § 34-24-70; Utah Code Ann. §§ 7-1-102, 7-1-702 (Supp. 1984).

to be Codified at

[18] Only Maine permits essentially unlimited entry by out-of-state holding companies. Me. Rev. Stat. Ann. tit. 9B, § 1013 (West Supp. 1984).

[19] N.Y. Banking Law § 142-b (McKinney 1984). When the regional restrictions in the Rhode Island statute lapse on July 1, 1986, that state's statute also will impose a simple reciprocity requirement (1983 R.I. Gen. Laws § 19-30-2(a)(1), *reprinted at* Pet. App. A105).

[20] The Delaware statute, for example, permits out-of-state holding companies to acquire only one in-state bank, which,

blanket prohibition in very limited ways.[21] Virtually all of these provisions would run afoul of the Commerce Clause in the absence of congressional authorization.[22] Yet the Board repeatedly has approved in-

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among other things, must be "operated in a manner and at a location that is not likely to attract customers from the general public in [Delaware] to the substantial detriment of existing banking institutions located in [the] state." Del. Code Ann. tit. 5, § 803(4) (Supp. 1984). Similarly restrictive "special purpose" statutes are found at Md. Fin. Inst. Code Ann. § 5-903 (Supp. 1984); Neb. Rev. Stat. §§ 8-1511 to 8-1513 (Supp. 1984); Nev. Rev. Stat. (to be codified at) § 666.065; S.D. Codified Laws Ann. § 51-16-40 (Supp. 1984); Va. Code § 6.1-392 (1983).

[21] Several states have grandfather provisions that permit in-state acquisitions only by out-of-state holding companies that owned banks in-state prior to a certain date. Fla. Stat. Ann. § 658.29 (West 1984); Ill. Ann. Stat. ch. 17, §§ 2510, 2710 (Smith-Hurd 1981); Iowa Code Ann. § 524.1805 (West Supp. 1984-1985). Other states permit out-of-state bank holding companies to acquire only failing banks. Minn. Stat. Ann. § 49.48 (West Supp. 1985); 1983 Or. Laws ch. 367 (to be codified); Wash. Rev. Code § 30.04.230(a) (1984). Alaska permits the acquisition by out-of-state holding companies of existing in-state banks formed after a certain date. Alaska Stat. § 06.05.235 (Supp. 1983).

[22] Reciprocity requirements such as those in the New York and Rhode Island statutes (see n.19, *supra*) are, in the absence of congressional authorization, unconstitutional in virtually all circumstances; states may not use "the threat of economic isolation as a weapon" with which to obtain reciprocal action from sister states. *Cottrell*, 424 U.S. at 379; see generally *id.* at 370-381; *Sporhase*, 458 U.S. at 957-958. Statutes such as the one found in Delaware (see n.20, *supra*), which for overtly protectionist reasons limit the in-state activies permitted to out-of-state companies, are equally suspect. See, *e.g.*, *H.P. Hood & Sons, Inc.* v. *Du Mond*, 336 U.S. 525, 539-540 (1949). Indeed, all of the state statutes in this area would appear to be per se unconstitutional (absent congres-

terstate transactions consummated under these statutes, in the process finding such laws "sufficient for purposes of satisfying the Douglas Amendment." *NCNB Corp.*, 68 Fed. Res. Bull. 54, 59 (1982). See *General Bancshares Corp.*, 69 Fed. Res. Bull. 802 (1983) (involving Illinois law); *BankAmerica Corp.*, 69 Fed. Res. Bull. 568 (1983) (Washington law); *Citicorp*, 68 Fed. Res. Bull. 499 (1982) (Delaware law); *Provident National Corp.*, 68 Fed. Res. Bull. 194 (1982) (Delaware law); *NCNB Corp.*, 68 Fed. Res. Bull. at 59; *Northwest Bancorporation*, 38 Fed. Reg. 21530 (1973) (Iowa law). Indeed, the Board scrutinized the individual transactions before approving them to ensure that they conformed with the restrictions imposed by state law. See *General Bancshares*, 69 Fed. Res. Bull. at 802; *BankAmerica*, 69 Fed. Res. Bull. at 569; *Citicorp*, 68 Fed. Res. Bull. at 499, 500; *Provident National*, *supra*.

In reaching its conclusions in the present case, the Board noted that its prior decisions were grounded on the belief "that the states have full discretion to

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sional authorization) because they are economic regulations that explicitly accord different treatment to in-state and out-of-state companies, and plainly do not "visi[t] [their] effects equally upon both interstate and local businesses." *Lewis*, 447 U.S. at 36. See *id.* at 42-44. These statutes certainly would be unconstitutional under petitioners' theory, because they are grounded on a conscious decision to exclude certain forms of commerce from the enacting state (see Citicorp Br. 36). While petitioners maintain that regional restrictions are particularly offensive to the Commerce Clause (see *ibid.*), this Court never has suggested that overtly protectionist measures that offer disparate treatment to in-state and out-of-state companies are entitled to an extra measure of Commerce Clause protection when they benefit the residents only of one, rather than of several, states.

set the terms of entry of out-of-state bank holding companies" (Pet. App. A71). Indeed, the Board has "consistently construed the Douglas Amendment to authorize the states to limit or to restrict entry by out-of-state bank holding companies." *Bank of New York*, 70 Fed. Res. Bull. 527, 528 (1984). The Board has thus flatly rejected the contention, essentially repeated by petitioners here (see n.10, *supra*), that "Congress did not intend to allow state legislatures to choose selectively which out-of-State bank holding company could enter the State." *Northwest Bancorporation*, 38 Fed. Reg. at 21531-21532.[23]

As petitioners note (Citicorp Br. 8-9; Northwest Bancorp Br. 8), the Board in this case frankly acknowledged its lack of expertise in resolving constitutional issues. But it is not the Board's constitutional analysis that is due respect; it is the Board's views on the meaning of the BHCA that are entitled to the "greatest deference" (*Board of Governors* v. *Investment Company Institute*, 450 U.S. 46, 56 (1981)). Here, the Board's familiarity with the statutory language and the congressional purposes

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[23] Amicus Curiae Bank of New York offers a novel argument on a related point. It maintains that once a state permits the acquisition of any in-state bank by any out-of-state holding company, under the terms of the Douglas Amendment the state action must be interpreted as lifting the federal prohibition as to *all* such transactions. Br. of Amicus Curiae Bank of New York Co., Inc. 7-10. If accepted, this interpretation would mean that states seeking to permit only very limited interstate banking would find themselves to have inadvertently authorized full interstate banking. Such a reading of the Amendment has been flatly rejected by the Board (*Bank of New York*, 70 Fed. Res. Bull. 527 (1984)) and the courts (*Iowa Independent Bankers*, 511 F.2d at 1296), and cannot be squared with the principle of deference to state policy articulated by the drafters of the Douglas Amendment.

led it to conclude both that the Douglas Amendment is, in a general sense, "a renunciation of federal interest in regulating the interstate acquisition of banks by bank holding companies" (Pet. App. A52), and that even discriminatory state statutes fall within the literal terms of the Amendment. Accepting petitioners' contention that only state statutes that otherwise are valid under the Commerce Clause may be given force under the Douglas Amendment therefore would require rejection both of the Board's long-settled view and of the many typical (and to this point noncontroversial) state approaches to interstate bank acquisitions that we have described (pp. 21-22, *supra*).[24]

B. The Massachusetts and Connecticut Acts Do Not Constitute A Compact That Must Be Approved By Congress

This Court repeatedly has held that "the 'application of the Compact Clause is limited to agreements that are "directed to the formation of any combination tending to the increase of the political power in the States, which may encroach upon or interfere with the just supremacy of the United States." ' " *United States Steel Corp* v. *Multistate Tax Comm'n*, 434 U.S. 452, 471 (1978), quoting *New Hampshire* v. *Maine*,

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[24] As petitioners note (Citicorp Br. 37-38), the Board expressed the view that such statutes impose "substantially less of a burden on commerce" than do regional arrangements (Pet. App. A71; see *Citicorp*, 71 Fed. Res. Bull. 101, 103 (1984)). But the Board nevertheless recognized that the statutes "obviously result in some burden on interstate commerce" (Pet. App. A71), and that their validity would be called into question if the Massachusetts and Connecticut Acts were invalidated (*ibid.*). This view undoubtedly is correct. See n.22, *supra*.

426 U.S. 363, 369 (1976), in turn quoting *Virginia* v. *Tennessee*, 148 U.S. 503, 519 (1893). Thus, as construed by this Court, the Clause is directed at joint state action that threatens to interfere with the federal government's activities, or that might disturb the "federal structure" (*Multistate Tax Comm'n*, 434 U.S. at 478) by displacing traditional federal and state decision-making mechanisms. "[T]he test" of whether an agreement between states requires congressional approval, then, "is whether the Compact enhances state power *quoad* the National Government." *Id.* at 473. The New England Acts—even if we assume that they otherwise are "compacts"—do not satisfy that test.

1. It is of course true, as petitioners note (Citicorp Br. 45), that the federal government has a general interest in the integrity of the nation's banking system. But that is only the beginning of the inquiry, for "every state cooperative action touching interstate or foreign commerce implicates some federal interest." *Multistate Tax Comm'n*, 434 U.S. at 480 n.33. Such cooperative action also implicates the Compact Clause only when, in addition, the challenged agreement presents "a threat of encroachment or interference" with federal prerogatives "through enhanced state power." *Ibid.*

The state Acts at issue here present no such threat. It is Congress itself that struck the balance between federal and state authority in the area of interstate bank acquisitions when it enacted the Douglas Amendment, which, as the Board noted, amounts to "a renunciation of federal interest in regulating the interstate acquisition of banks by bank holding companies" (Pet. App. A52). Statutes enacted under the authority of the Amendment therefore can hardly

interfere "with the full and free exercise of federal authority." *Cuyler* v. *Adams*, 449 U.S. 433, 440 (1981). And the Acts do not raise even a potential threat to federal regulatory interests: they do not create a multi-state regulatory system to rival the Board, or establish any sort of administrative mechanism. Bank acquisitions in each New England state currently proceed, as before, under the dual supervision of that state's regulatory authority and of the Board.

Petitioners nevertheless contend that the Connecticut Act threatens to disrupt the operation of 12 U.S.C. 1823(f) and 1842(d), which in limited circumstances permit the Federal Deposit Insurance Corporation to arrange for the interstate acquisition of failing banks. The Connecticut Act requires New England-based holding companies to divest themselves of their Connecticut banks if they acquire banks outside of New England (Pet. App. A99), and petitioners therefore claim (Citicorp Br. 46; Northeast Bancorp Br. 37) that the Act will discourage such holding companies from attempting to acquire failing banks outside of the region. The divestiture requirement does not appear in the Massachusetts Act, however, and therefore cannot represent joint action of the sort that might implicate the Compact Clause. To the extent that the Connecticut Act is inconsistent with the congressional scheme, it is simply preempted by federal law. See, *e.g.*, *Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U.S. 132 (1963).[25]

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[25] Petitioner Northeast Bancorp asserts that both state Acts conflict with the failing bank provisions by "prohibit[ing] Massachusetts and Connecticut banks and bank holding companies from acquiring non-New England banks" (Northeast

2. While the state Acts thus do not encroach on specific federal banking concerns, petitioners further contend that the New England arrangement more broadly threatens the national government's interest in safeguarding the integrity of the federal structure. It does so, petitioners maintain, because through the state Acts Massachusetts and Connecticut are "increasing their power at the expense of sister states and thereby undermining the Union" (Citicorp Br. 42; Northeast Bancorp Br. 33-34). This contention both misstates the nature of the interests implicated by the Compact Clause and, like petitioners' Commerce Clause claim, disregards the import of the statutory scheme established by the Douglas Amendment.

Even if we assume that the state Acts were the product of joint action, nothing in either Act, or in both together, works "to the detriment of federal supremacy." *Multistate Tax Comm'n*, 434 U.S. at 460. To the contrary, the state Acts simply make use of authority specifically delegated by Congress in

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Bancorp Br. 37; see also Citicorp Br. 46, making same assertion as to Connecticut Act). In fact, neither Act in terms establishes such a prohibition. And even if the Acts could be interpreted as creating such a bar, it is far from clear that this is the type of interference with federal interests that would call the Compact Clause into play. As noted below, the state Acts have no effect on the "federal structure" (*Multistate Tax Comm'n*, 434 U.S. at 478), do not displace traditional state and federal decision-making roles, and do not have implications for "federal supremacy" (*id.* at 471). To the extent that the state Acts simply are inconsistent with federal law, both already have been preempted by 12 U.S.C. 1823(f)(4)(i), which provides that the identified failing bank acquisitions may occur "[n]otwithstanding [the Douglas Amendment] or any other provision of law, State or Federal."

permitting the consummation of certain types of private transactions. Legislation of this sort hardly involves action taken in a "concerted fashion to foreclose federal law" (*id.* at 491 (White, J., dissenting)), and does not in any other way detract from federal authority.

Conversely, the state Acts in no way confer upon the states, either singly or as a group, new or expanded political powers. As noted above, the Acts do not create a multi-state regulatory entity that is empowered to bind or demand action from the New England states, or that may undertake initiatives on its own (cf. *Multistate Tax Comm'n*, 434 U.S. at 492 (White, J., dissenting)); as a result (despite petitioners' suggestion to the contrary, see Citicorp Br. 45-46), the Acts " 'neither project a new presence onto the federal system nor alter any state's basic sphere of authority.' " *Multistate Tax Comm'n*, 434 U.S. at 469 n.21, quoting Tribe, *Intergovernmental Immunities in Litigation, Taxation, and Regulation: Separation of Powers Issues in Controversies About Federalism*, 89 Harv. L. Rev. 682, 712 (1976). And the Acts do not "purport to authorize the [New England states] to exercise any powers they could not exercise" in the absence of the state legislation. *Multistate Tax Comm'n*, 434 U.S. at 473. It therefore is difficult to see how such enactments "impermissibly enhance state power." *Id.* at 472.[26]

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[26] The state Acts at issue here have considerably less of an impact on the federal structure than does the Multistate Tax Commission, the validity of which was settled in *Multistate Tax Comm'n*. Like the Tax Compact, the New England arrangement does not "authorize the member States to exercise any powers they would not exercise in its absence," does not "delegate sovereign power" to a multi-state entity, and leaves

Finally, it is inaccurate to assert that the New England arrangement "benefits New England states *at the expense of all other states*" (Citicorp Br. 41-42 (emphasis added)). The state Acts, which authorize certain private transactions, do not work to the *political* disadvantage of states outside of New England; indeed, petitioners have failed to explain how the Acts bear at all upon the "authority and power" of such states.[27] *Multistate Tax Comm'n*, 434

"each State * * * free to withdraw at any time." *Multistate Tax Comm'n*, 434 U.S. at 473. Similarly, each New England state would be free to act on its own to permit in-state acquisitions only by New England holding companies, even in the absence of regional provisions in other state statutes; indeed, holding companies based in Maine—which permits essentially unlimited entry by out-of-state holding companies (see n.18, *supra*), and therefore satisfies the reciprocity requirements of the Massachusetts and Connecticut Acts—may acquire banks in Connecticut and Massachusetts. Cf. *Multistate Tax Comm'n*, 434 U.S. at 474-475. Unlike the Tax Compact, however, the New England arrangement is not marked by an articulated history of hostility to federal interests (cf. *id.* at 487-489 (White, J., dissenting)); is not designed to, and by its nature cannot, foreclose federal activity in the area (cf. *id.* at 491 (White, J., dissenting)); does not create an entity with an independent existence (cf. *id.* at 492 (White, J., dissenting)); imposes no requirements or constraints upon member states (cf. *ibid.*); and did not depend upon joint action to go into effect (cf. *id.* at 493 (White, J., dissenting)).

[27] Claims of competitive injury suffered by companies based in states outside of New England do not raise issues under the Compact Clause. As the Court noted in *Multistate Tax Comm'n*, 434 U.S. at 478, "it is not clear how our federal structure is implicated" by the economic effects of state action that does not "transgres[s] the bounds of the Commerce Clause." The state Acts, of course, are consistent with the Commerce Clause because authorized by the Douglas Amendment. See pp. 9-25, *supra*.

U.S. at 494 (White, J., dissenting). Moreover, to the extent that any states are disadvantaged by current restrictions on interstate banking, the injury flows from the Douglas Amendment itself.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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